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No. 85-802

In the Supreme Court of the United States

October Term, 1985

JOHN HOLMAN & SONS, LTD., and HORACE, HOLMAN & COMPANY LTD.,

Petitioners,

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF SAN DIEGO,

Respondent,

DONALD J. CORREIA and CHERYL M. CORREIA, LAWTON-BYRNE-BRUNER INSURANCE AGENCY COMPANY, CANADIAN INTERNATIONAL MARINE UNDERWRITERS LTD. and CANADIAN MARINE UNDERWRITERS LTD.,

Real Parties in Interest.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

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INTRODUCTION

Shortly after the instant Petition for Writ of Certiorari was filed, the Court granted review in *Connolly v. Burt*, No. 85-298 (ruling below, *Burt v. Board of Regents of University of Nebraska*, 757 F.2d 242 (10th Cir. 1985).

In this Supplemental Brief we compare and contrast the facts of the instant case with those in *Burt*, demonstrating that this is a similar but even more compelling case for review.

LEGAL DISCUSSION

In *Burt*, the plaintiff physician sued the Board of Regents of the University of Nebraska and the University's Chairman of the Department of Orthopedic Surgery, Dr. Connolly, under whom plaintiff had done an orthopedic residency. The suit was brought in Colorado seeking damages for alleged defamation, etc. based upon an uncomplimentary letter Dr. Connolly had written about the plaintiff in response to inquiries made when plaintiff applied for medical staff privileges at several Colorado hospitals. Dr. Connolly established that he was a Nebraska resident, did no business in Colorado, owned no property there and was never physically present in connection with plaintiff's claim. The district court dismissed for lack of personal jurisdiction. The Court of Appeals reversed, with Judge Seth dissenting.

There are many important similarities between *Burt* and this case; the dissimilarities only further underscore the importance of review here.[1] The long-arm statutes of both Colorado and California extend to the full limit of the Due Process Clause. See *Behagen v. Amateur Basketball Association of America*, 744, F.2d 731, 733 (10th Cir. 1983), cert. denied 105 S.Ct. 1879 (1985) [Colorado law]; *Kulko v. Superior Court*, 19 Cal.3d 514,

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[1]Although *Burt* involves a case with First Amendment overtones, this Court has recently explained that there is no special jurisdictional jurisprudence for cases involving the First Amendment. *Calder v. Jones*, ___ U.S. ___, 104 S.Ct. 1482, 1487-1488 (1984).

521 (1977), rev'd, 436 U.S. 84 (1978). In either jurisdiction, when in personam jurisdiction is challenged the plaintiff has the burden of showing the basis for jurisdiction. See *Burt v. Board of Regents of Univerisity of Nebraska, supra,* 757 F.2d 242, 247 (Seth, J. dissenting.) [Colorado Law]; *University Financing Consultants, Inc. v. Barouche,* 148 Cal.App.3d 1165, 1168 (1983).

In *Burt* and the instant case, jurisdiction rests upon a single act. In each the party over whom long-arm jurisdiction is asserted was sought out at his place of residence and solicited to do something which became the act causing an "effect" upon which liability is asserted in a foreign jurisdiction. The major difference between the cases on this point is that Dr. Connolly was directly contacted by the Colorado hospitals and responded directly to them, i.e., he at least had actual knowledge that his letter was a "contact" with Colorado. In contrast, John Holman & Sons Ltd. was contacted by a Canadian corporation regarding insurance on a Missouri corporation's tuna fleet. John Holman had no contact with the forum state. Since John Holman's acts were all in London, there was nothing in its conduct equivalent to the letter in *Burt;* to the contrary, the excess insurance policy which was issued by the carriers contacted by John Holman expressly states "the place of physical and actual issue and delivery of this policy is the City of London." If anything, John Holman is more nearly analogous to the Nebraska mailman who picked up Dr. Connolly's letter and started it on its way to Colorado.

There is no real analogy for Horace, Holman & Company Ltd., except possibly if one imagines that in *Burt* Colorado also asserted jurisdiction over a person with a name similar to Dr. Connolly's because he was

also a doctor and had bought some medical instruments from Dr. Connolly.[2]

In each case jurisdiction is asserted on the basis of an extraordinary application of an "effects" test which cannot be reconciled with the forty-year development of minimum contacts doctrine.[3] The instant case, however, involves a much more extreme notion of actionable "effects." The whole point of the letter of reference in *Burt* was to cause an "effect" in Colorado.

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[2]In a brief in opposition to the petition, Lawton-Byrne-Bruner Insurance Agency Company ("LBB") directly embraces this fantastic jurisdictional premise stating: "Through its purchase of an undisclosed percentage of the assets of John Holman & Sons, Horace, Holman & Co. became the direct beneficiary of John Holman & Sons's forum-related activities." (Opposition, pp. 7-8, fn. omitted.)

The dubious logic reflected in this proposition is mirrored in LBB's wan assertion that the trial court could treat Horace, Holman as "a successor in interest to John Holman & Sons" because this unsupported description was only "vaguely contradicted". First, since LBB had the burden of establishing the factual basis for California jurisdiction and did not, it would be irrelevant even if the asserted basis were only vaguely, contradicted. Second, the continuing existence of John Holman was repeatedly established in a direct and unequivocal manner, for example, by the affidavit of its present chairman and managing director. (E.g. App. A19) Third, we are at a loss to understand what it means to be "a" successor in interest unless this is simply a veiled way of describing a purchaser of some assets. Finally, LBB's characterization is unaccompanied by the requisite constitutional analysis. It is, after all, still supposed to be true that "[e]ach defendant's contacts with the forum State must be assessed individually." *Calder v. Jones, supra*, 104 S.Ct. at 1487.

[3]In its opposition to the petition LBB makes the same error as that for which the dissent chided the majority in *Burt*, namely that this Court has adopted an "effects" test of jurisdiction independent of minimum contacts (see Opposition, p. 4 ["this is a 'foreseeable effects' case—not a 'no contacts' case"].) "Effects" has not yet swallowed "contacts."

John Holman, however, had no actual knowledge that its conduct in London had any California connection, although it may have been foreseeable that a tuna boat might wind up in California litigation, just as it is foreseeable that a doctor may require a letter of reference anywhere. In *Burt* any "effect" was a direct and intended consequence of the letter. In the instant case, any effect in California was fortuitous, remote and unintended.

Even assuming that some vague "effect" was somehow foreseeable, " 'foreseeability' alone has *never* been a sufficient benchmark for personal jurisdiction under the Due Process Clause." *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 295 (1980), emphasis added. Indeed in *Calder v. Jones, supra,* 104 S.Ct. 1482, 1487, the Court stressed "[t]he mere fact that [defendants] can 'foresee' that the article will be circulated and have an effect in California is not sufficient for an assertion of jurisdiction." The conduct alleged in *Burt* was of an intentionally tortious nature. Here, the gravamen of the charge against John Holman is that it negligently placed insurance in the London market; it did nothing aimed at California. In no intellectually honest sense can it be said that it purposely availed itself of California law, nor that it could reasonably anticipate being haled around the globe to justify its conduct in London as a London broker, when it had been engaged in London by a Canadian corporation regarding insurance for a Missouri corporation.

Nebraska is, of course, much closer to Colorado than London is to Southern California, yet arguably the hardship of defending a case at a distance does not increase directly with mileage. However, the fact that this case involves the exercise of jurisdiction over English corporate citizens sought out and acting in their

homeland raises considerations of fairness and prudence in the realm of international relations which have no parallel in *Burt*.

> "If other nations believe that American policy unfairly disadvantages their citizens or that it proceeds from fiat rather than principle, they are apt to resist enforcement efforts and perhaps to retaliate with countermeasures of their own." Note, *Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction*, 98 Harv. L. Rev. 1310, 1321 (1985) (fns. omitted); see, e.g., *Pacific Atlantic Trading Co. v. M/V Main Exp.*, 758 F.2d 1325, 1330 (9th Cir. 1985).

Although perhaps merely an incident of its procedural history, it is also worth noting that the assertion of jurisdiction in *Burt*, though possibly no more constitutionally permissible than in this case, was at least accorded plenary appellate review. The final word on this crucial issue was not that of a state trial court nor the discretionary denial of review with the non sequitur "no abuse of discretion is shown."[4]

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[4]LBB is greatly mistaken in its view of this Court's jurisdiction with respect to the third issue framed by the petition. (See Opposition, pp. 2, 9.) Petitioners are between the very Scylla and Charybdis described in *General Council on Finance and Administration v. Superior Court*, 439 U.S. 1355 (1978). (Rehnquist, J., in chambers.) There Justice Rehnquist observed that if California procedural law is as asserted by Petitioners—a point implicitly conceded by LBB—"I am convinced that this Court would find the Superior Court's judgment to be 'final' within the meaning of § 1257." 439 U.S. at 1371-1372. There can be no reasonable doubt of the accuracy of this view. See, e.g., *Shaffer v. Heitner*, 433 U.S. 186 (1977); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

CONCLUSION

Minimum contacts and traditional notions of fair play and substantial justice have not been and cannot legitimately be replaced with some shapeless new jurisdictional "foreseeable effects" standard. There is no constitutional basis for California's exercise of personal jurisdiction over Petitioners, or either of them.

We respectfully pray that the Petition for Writ of Certiorari will be granted.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

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I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on December 19, 1985, I served the within *Supplemental Brief in Support of Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on December 19, 1985, at Los Angeles, California.

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(Original signed)